MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

CITY OF LANSING'S APPEAL IN ROAD INJURY CASE BEFORE MICHIGAN SUPREME COURT THIS WEEK; INJURED GIRLS WALKED IN STREET, WERE HIT BY CAR AFTER FINDING CITY SIDEWALK BLOCKED BY ICE AND SNOW

LANSING, MI, January 7, 2008 – The case of two Lansing girls hit by a car while walking in the street – after they found the sidewalk blocked by ice and snow – will be heard by the Michigan Supreme Court in oral arguments tomorrow.

At issue in *Buckner v City of Lansing* is whether the city of Lansing is liable for the January 29, 2005 accident, which resulted in the death of one girl and serious injuries to another. The two girls and a companion were walking in the street that evening after finding the sidewalk piled with ice and snow, at least some of which was placed there by city snowplows. The girls' representatives sued the city under MCL 691.1402(1), the "highway exception" to governmental immunity. Under the highway exception, a "person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." Among the issues before the Supreme Court is whether the girls' decision to walk in the roadway – instead of on a cleared sidewalk on the opposite side of the street – prevents the plaintiffs from establishing that the city's actions proximately caused the accident. Also before the Court is the issue of whether the Court of Appeals correctly held that the city might be held liable under the highway exception for an "unnatural accumulation" of ice and snow.

Also before the Court is *Allison v AEW Capital Management, L.L.P.*, in which the plaintiff sued his landlord and an apartment management company after he fell and broke his ankle in his apartment building's parking lot. At issue is whether the defendants can be held liable for the accumulation of snow in the parking lot; they contend that a 2005 Court of Appeals decision, as well as the "open and obvious danger" tort doctrine, bar the plaintiff's suit. The plaintiff argues that the landlord and management company are liable for common-law negligence in failing to keep the parking lot cleared; in addition, a statute that requires landlords to maintain "common areas" for their intended use places a duty on the defendants to maintain the parking lot, the plaintiff contends.

The remaining cases involve medical malpractice, worker's compensation, products liability, no-fault insurance, and criminal law issues.

Court will be held on **January 8 and 9** in the Supreme Court's courtroom on the sixth

floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin at **9:30 a.m.** each day.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's web site at* http://www.courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Tuesday, January 8
Morning Session

ESTATE OF BUCKNER, et al. v CITY OF LANSING, et al. (case no. 133772)
Attorney for plaintiffs Estate of Chantell Buckner, by its Personal Representative, Richard Rashid, and LaQuata Wright, Minor, by her Conservator, Michael J. Panek: Kitty L. Groh/(517) 351-3700
Attorneys for defendant City of Lansing: Christine D. Oldani, David K. Otis/(313) 983-4796
Attorney for amicus curiae Michigan Association of Justice: Liisa R. Speaker/(517) 482-8933
Trial court: Ingham County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/133772/133772-Index.htm
At issue: Three Lansing girls, finding the sidewalk covered with piled up snow and ice, chose to walk in the street instead, where two of them were struck by a car. Does the girls' decision to walk in the street prevent the plaintiffs from establishing proximate causation in their case against the city of Lansing? Does the statutory duty to "maintain the highway in reasonable repair," MCL 691.1402(1), impose obligations relating only to structural-type defects, or does it include a duty not to place temporary obstacles on a highway that render it impassable? Is the city entitled to governmental immunity because the injuries occurred in the street, and not on the sidewalk that the city allegedly failed to maintain?
Background: After dark on the evening of January 29, 2005, two teenage girls and a seven-year-old girl were walking to a nearby McDonald's in Lansing. The sidewalk was blocked by piles of snow and ice, placed there, at least in part by the city of Lansing's recent snowplowing. Instead of crossing the street to use the other sidewalk, which was cleared, the three girls walked in the street. Two of them were struck by a man driving home after visiting his local Veterans of Foreign Wars post. Thirteen-year-old LaQuata Wright was badly injured; seven-year-old Chantell Buckner was killed. Buckner's estate representative and Wright's conservator sued the driver and his family, the VFW Post, and the city of Lansing. The city was sued under MCL 691.1402(1), the "highway exception" to governmental immunity. Pursuant to the highway exception, a "person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." The plaintiffs' first lawsuit cited the city's failure to maintain, clear, shovel or remove the unnatural accumulation of snow and ice from the north sidewalk. According to the plaintiffs, this disrepair of the sidewalk "forced" the girls to walk in the street roadway. The plaintiffs then filed a second lawsuit, alleging a physical defect in the sidewalk surface and negligence on the city's part in not properly closing that sidewalk. The city

moved to dismiss both lawsuits on the basis of governmental immunity, arguing that the highway exception did not apply. The trial court denied the city's motion. The Court of Appeals, in a published opinion, reversed and ordered summary disposition in the second lawsuit. But the Court of Appeals agreed with the trial court that the first lawsuit could go forward. A governmental entity might still be held liable under the highway exception for an "unnatural accumulation" of ice and snow, the Court of Appeals reasoned. The city appeals.

COOPER, et al. v AUTO CLUB INSURANCE ASSOCIATION (case no. 132792)
Attorney for plaintiffs Amyruth L. Cooper, by her Next Friend, Sharon L. Strozewski, and Loralee A. Cooper, by her Next Friend, Sharon L. Strozewski: James A. Iafrate/(734) 994-0200
Attorney for defendant Auto Club Insurance Association: James G. Gross/(313) 963-8200
Trial court: Washtenaw County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/132792/132792-Index.htm
At issue: The plaintiffs sued, seeking to recover no-fault personal protection insurance benefits from the defendant insurance company. In their lawsuit, the plaintiffs alleged that the defendant fraudulently induced their mother to accept an unreasonably low compensation rate for the in-home attendant care services that she provided to them. Is the plaintiffs' common law cause of action for fraud subject to the no-fault act's one-year-back rule in MCL 500.3145(1)?
Background: In 1987, sisters Amyruth and Loralee Cooper sustained severe brain injuries in an automobile accident. Both have required 24-hour attendant care ever since. Auto Club Insurance Association is the Coopers' no-fault automobile insurer. The Coopers sued Auto Club in 2003, alleging that the insurer underpaid their mother, Sharon Strozewski, for the in-home attendant care that she provided to her daughters over the years. In 2004, the plaintiffs amended their complaint to allege that Auto Club fraudulently induced Strozewski to accept an unreasonably low compensation rate for her in-home attendant care services. During the course of the litigation, Auto Club filed three motions for partial summary disposition, all of which the trial court denied. In 2005, the parties entered into a stipulated judgment that fixed the amount of the plaintiffs' damages, but allowed Auto Club to file an appeal of right from the trial court's earlier adverse decisions. In an unpublished opinion, the Court of Appeals reversed the trial court in part, finding that, under the one-year-back rule in MCL 500.3145(1), the plaintiffs may not recover no-fault personal protection insurance benefits relating to any losses that were incurred more than one year before the plaintiffs filed their complaint. In addition, the Court of Appeals found that Auto Club was entitled to summary disposition on the plaintiffs' fraud count because that count is nothing more than a no-fault claim couched in fraud terms. The plaintiffs appeal.

BRAVERMAN v GARDEN CITY HOSPITAL, et al. (case nos. 134445-6)
Attorney for plaintiff Eric A. Braverman, Successor Personal Representative of the Estate of Patricia Swann, Deceased: Allan S. Falk/(517) 381-8449
Attorney for defendants John R. Schairer, D.O., Gary Yashinsky, M.D., Abhinav Raina, M.D., and Providence Hospital and Medical Centers, Inc.: Robert G. Kamenec/(248) 901-4068
Attorney for amicus curiae Michigan Association for Justice: Donald M. Fulkerson/(734) 467-5620
Attorneys for amicus curiae Michigan Defense Trial Counsel: Linda M. Garbarino, Anita L. Comorski/(313) 964-6300

Trial court: Wayne County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/134445-6/134445,134446-Index.htm
At issue: In this medical malpractice case, the initial personal representative mailed a pre-suit notice of intent to file a lawsuit under MCL 600.2912b, but resigned without filing a complaint. The plaintiff, the successor personal representative, filed the medical malpractice complaint. Was the complaint timely filed? Was the successor personal representative entitled to rely on the notice filed by his predecessor under provisions of the Estates and Protected Individuals Code, MCL 700.3701?
Background: The initial personal representative in this medical malpractice case served the defendants with a pre-suit notice of intent to file a lawsuit under MCL 600.2912b, but resigned without filing a complaint. Eric Braverman, the successor personal representative, filed the medical malpractice complaint. The defendants moved to dismiss the case, arguing that the complaint was untimely because it was not filed within two years of the first personal representative's appointment. The trial court denied the motion. The Court of Appeals agreed with the trial court that the complaint was timely, but also exercised its discretion to address the defendants' contention that, under *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383 (2006), Braverman could not rely on the notice of intent filed by the first personal representative. The Court of Appeals panel declared a conflict with *Verbrugghe*, and a conflict panel was convened to examine *Verbrugghe* and the Court of Appeals decision in this case. In a published decision, the Court of Appeals conflict panel agreed that the complaint was timely. It also held that Braverman was entitled to rely on the notice filed by his predecessor under provisions of the Estates and Protected Individuals Code, MCL 700.3701. The defendants appeal.

Afternoon Session

STONE v WILLIAMSON, et al. (case no. 133986)
Attorney for plaintiffs Carl Stone and Nancy Stone: Donald W. Ferris, Jr. /(734) 677-2020
Attorneys for defendants David A. Williamson, M.D., Jackson Radiology Consultants, P.C., and W.A. Foote Memorial Hospital: Susan Healy Zitterman, Christina A. Ginter/(313) 965-7905
Attorney for amicus curiae Roy W. Waddell, M.D.: David R. Parker/(313) 875-8080
Attorney for amicus curiae ProNational Insurance Company: Noreen L. Slank/(248) 355-4141
Attorney for amicus curiae Michigan Health and Hospital Association: William L. Henn/(616) 774-8000
Attorney for amicus curiae Michigan Association for Justice: Mark R. Granzotto/(248) 546-4649
Attorneys for amicus curiae Citizens for Better Care: Jules B. Olsman/(248) 591-2300, Richard E. Shaw/(313) 963-1301
Attorney for amicus curiae Michigan Defense Trial Counsel: Matthew T. Nelson/(616) 752-2000
Trial court: Jackson County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/133986/133986-Index.htm
At issue: MCL 600.2912a(2) provides in part that "In an action alleging medical malpractice, the

plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." In *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), the Court of Appeals held that § 2912a(2) requires a plaintiff seeking to establish a claim of lost opportunity to show that the initial opportunity was diminished by more than 50 percent. Was *Fulton* correctly decided? If not, how should a lost opportunity be calculated? In this case, where the plaintiffs allege that the defendant radiologist failed to identify signs of an aneurysm on arteriogram films, forcing the plaintiff to undergo risky emergency surgery after the aneurysm ruptured, does the plaintiff have to establish a lost opportunity to achieve a better result within the meaning of § 2912a(2)? If so, did the plaintiff suffer such a lost opportunity?

Background: On April 4, 2002, Carl Stone suffered the rupture of an abdominal aortic aneurysm, which required emergency surgery to treat. Following the rupture, Stone had to have both legs amputated at mid-thigh level. Stone and his wife brought a medical malpractice suit against radiologist Dr. David Williamson, his professional corporation, and the hospital where he works. The Stones alleged that Williamson misread Carl Stone's January 25, 2000 arteriogram films and erroneously noted "no aneurysm" on the radiology report. Because Williamson did not identify the aneurysm on the 2000 films, Stone lost the opportunity to undergo elective surgery, the plaintiffs contended The plaintiffs' medical experts testified that a patient having elective surgery to repair an aortic aneurysm has a 95 percent chance of attaining a good result, which includes the potential to survive the rupture as well as avoiding additional medical complications. In contrast, misdiagnosed patients whose aneurysms rupture have only a 10 percent chance to achieve a good result, the experts said; in fact, 80 percent of patients with aortic aneurysm ruptures die, typically en route to obtain medical care. Of those who make it into surgery, 60 percent die during surgery, the plaintiff's experts stated. The defendants asked the trial court to dismiss the case, arguing that the plaintiffs could not establish that Stone suffered a lost opportunity within the meaning of MCL 600.2912a(2). Section 2912a(2) provides that "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." Under the Court of Appeals' decision in *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), § 2912a(2) requires a plaintiff seeking to establish a claim of lost opportunity to show that the initial opportunity was diminished by more than 50 percentage points, the defendants stated. But in Stone's case, the statistics show that the overall risk of all complications *other than death* was between 5 and 12 percent for elective surgery and up to 40 percent for emergency surgery; at most, Stone's loss of opportunity was 35 percent, the defendants argued. Moreover, when considering the specific risk of amputation, the opportunity for a better result was 1 percent for elective surgery and 5 percent for emergency surgery, the defendants contended. The trial court concluded that the defendants were reading *Fulton* too narrowly, and it denied the defendants' motion for summary disposition. After trial, the jury returned a verdict in the plaintiffs' favor; the trial court entered a judgment of $1,936,682. The trial court then denied the defendants' motion for judgment notwithstanding the verdict. The Court of Appeals affirmed in an unpublished opinion. The defendants appeal.

RODRIGUEZ, et al. v A.S.E. INDUSTRIES, INC., et al. (case no. 133686)
Attorney for plaintiff Raquel Rodriguez: Heather A. Jefferson/(248) 355-5555
Attorney for intervening plaintiff Pacific Employers Insurance: Martin L. Critchell/(248) 593-2450
Attorney for defendant A.S.E. Industries, Inc.: Rosalind H. Rochkind/(313) 446-5522

Attorney for amicus curiae Michigan Defense Trial Counsel, Inc.: Michael O. Fawaz/(248) 312-2800
Trial court: Wayne County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/133686/133686-Index.htm
At issue: In a products liability case, the jury's award of noneconomic damages is capped unless the jury finds that the defendant was grossly negligent, or the trial court finds that the defendant knew of the defect in the product, that the injury was likely to occur, and that the defendant willfully disregarded that knowledge. MCL 600.2946a(3); MCL 600.2949a. In this products liability case, the jury found that the defendant manufacturer was liable to the plaintiff for her injuries, but was not grossly negligent. In such a situation, when the jury makes factual findings that require application of the damages cap, may the trial court make independent factual findings concerning the defendant's culpability and refuse to apply the damages cap?
Background: Raquel Rodriguez, an American Axle employee, was severely injured in 1998 when her hair was caught in a machine roller of a machine while she was inspecting parts. She sued A.S.E. Industries, which manufactured and installed the machine. After a lengthy trial, the jury awarded Rodriguez over $10 million. The jury determined that A.S.E. Industries was 30 percent at fault, and that American Axle – which was not a party to the lawsuit – was 70 percent at fault. The jury also found that A.S.E. Industries was not grossly negligent. In post-trial proceedings, A.S.E. Industries argued that, because the jury found that the company was not grossly negligent, the trial court was obligated to apply the statutory cap on non-economic damages for products liability awards. Rodriguez argued that the statutory cap should not apply. MCL 600.2946a(3) provides that the non-economic damage cap does not apply "if the trier of fact determines by a preponderance of the evidence that the death or loss was the result of the defendant's gross negligence, or if the court finds that the matters stated in section 2949a are true." MCL 600.2949a states that the product liability non-economic damage cap does not apply if "if the court determines that at the time of manufacture or distribution the defendant had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that is the basis of the action, and the defendant willfully disregarded that knowledge . . . ." MCL 600.2946a allowed the trial court to make its own factual findings independent of the jury's verdict, Rodriguez contended. The trial court agreed and independently determined that A.S.E. Industries knew of the defect in the machine, that A.S.E. Industries willfully disregarded that knowledge, and that the injury was likely to occur. Accordingly, the trial court refused to apply the damages cap. The trial court also concluded that, even if the damages cap applied, the apportionment of non-party fault is applied to the verdict before the cap. Ultimately, the trial court entered judgment against A.S.E. Industries for $1.83 million. In a published opinion, the Court of Appeals affirmed the trial court, concluding that a trial court may make factual findings inconsistent with the jury's findings, and may independently determine that the non-economic damages cap does not apply. The Court of Appeals did not reach the issue of whether the trial court properly applied the non-party fault percentage. A.S.E. Industries appeals.

Wednesday, January 9
Morning Session

ALLISON v AEW CAPITAL MANAGEMENT, L.L.P., et al. (case no. 133771)

Attorneys for plaintiff Irving Allison: Brian A. Kutinsky/(248) 353-5595, Barbara H. Goldman/(248) 569-9011
Attorneys for defendants Village Green Management Company and BFMSIT, II: Christine D. Oldani, Edward M. Turfe/(313) 983-4796
Attorney for amicus curiae Michigan Association for Justice: Janet M. Brandon/(248) 855-5580
Attorney for amicus curiae Apartment and Real Property Associations (Property Management Association of Michigan, Detroit Metropolitan Apartment Association, Property Management Association of West Michigan, Property Management Association of Mid-Michigan, Washtenaw Area Apartment Association, Apartment Association of Michigan, Institute of Real Estate Management Michigan Chapter 5, Michigan Housing Council, Rental Property Owners Association of Kent County, and Real Estate Investors Association of Wayne County): I. Matthew Miller/(248) 851-8000
Trial court: Oakland County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/133771/133771-Index.htm
At issue: The plaintiff fell on snow and ice in the parking lot at his apartment complex. He sued his landlord and the apartment management company. The trial court granted summary disposition to the defendants, concluding that the danger posed by the snow and ice was open and obvious, and not covered by MCL 554.139(1), which imposes a duty on lessors to keep their premises in reasonable repair and common areas fit for their intended use. The Court of Appeals reversed, rejecting an earlier panel's analysis of the applicability of MCL 554.139(1) in *Teufel v Watkins*, 267 Mich App 425, 429 n 1 (2005). Was the Court of Appeals bound by the *Teufel* court's analysis? Does MCL 554.139(1) cover snow and ice accumulations?
Background: On the morning of March 13, 2003, Irving Allison slipped and fell, breaking his ankle, while walking to his apartment building's the parking lot. It was snowing, and there was snow on the ground. Allison sued his landlord and the apartment complex's management company, claiming that the defendants were negligent in maintaining the parking lot. Allison also alleged that the defendants violated MCL 554.139(1)(a) and (b), which require a landlord to keep "the premises and all common areas" fit for "the use intended by the parties" and to "keep the premises in reasonable repair during the term of the lease . . . ." The defendants filed a motion for summary disposition, arguing that Allison's negligence action was barred by the open and obvious doctrine. The defendants also relied on the Court of Appeals decision in *Teufel v Watkins*, 267 Mich App 425 (2005). *Teufel* established that an accumulation of snow and ice was not a defect in the premises, the defendants argued; therefore, a lessor's duty under MCL 554.139(1)(a) and (b) did not extend to snow and ice removal. The circuit court granted the defendants' motion. On appeal, the Court of Appeals initially concluded that it was obligated by MCR 7.215(J)(1) to affirm the trial court's ruling. MCR 7.215(J)(1) states that a "panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule." *Teufel* was decided in 2005, and had not been reversed or modified by the Supreme Court or the Court of Appeals. Accordingly, although the Court of Appeals panel criticized *Teufel*, it stated that it was "constrained to rule that an individual who is injured as a result of snow and ice accumulation in the parking lot of an apartment complex may not rely on the statutory duties imposed by MCL 554.139(1)(a) and (b) to avoid application of the open and obvious doctrine." The panel declared a conflict between its decision and *Teufel*. After the Court of Appeals judges

voted not to convene a special conflict panel to reconsider the *Teufel* holding, the judges who decided this case then granted Allison's motion for reconsideration, vacated the first opinion, and reversed the trial court in a published opinion. In this second opinion, the Court of Appeals panel held that, because *Teufel*'s statutory interpretation came in a footnote to the opinion, it was not a binding rule of law for purposes of MCR 7.215(J)(1). The panel held that the parking lot where Allison was injured was a common area under MCL 554.139(1)(a), and that the landlord had an obligation to maintain it and keep it free from snow and ice. The defendants appeal.

GEE v ARTHUR B. MYR INDUSTRIES, INC. (case no. 133762)
Attorney for plaintiff Waylon E. Gee: Daryl C. Royal/(313) 730-0055
Attorney for defendant Arthur B. Myr Industries, Inc.: William N. Evans/(248) 548-8540
Tribunal: Workers' Compensation Appellate Commission
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/133762/133762-Index.htm
At issue: The plaintiff sustained a severe work-related injury in 1992 and was paid worker's compensation benefits. In a 2001 proceeding, a magistrate found that the plaintiff was totally and permanently disabled. At the close of proofs in this proceeding, the plaintiff requested attendant care benefits, based on assistance provided by his family. The magistrate did not address this claim, but the Workers' Compensation Appellate Commission denied it because plaintiff failed to present proof on a required element of the claim. The plaintiff then filed a new application for hearing, requesting payment for 56 hours of attendant care per week. The plaintiff's counsel filed applications on behalf of plaintiff's wife and mother, claiming reimbursement for the attendant care services they provide to the plaintiff. Are these claims barred by res judicata?
Background: Waylon Gee sustained a severe work-related injury in 1992 and was paid voluntary worker's compensation benefits after that date. In a 2001 proceeding, a magistrate found that Gee was totally and permanently disabled. At the close of proofs, Gee requested attendant care benefits, based on assistance his family provided; the magistrate did not address this claim. On appeal to the Workers' Compensation Appellate Commission, Gee claimed that the magistrate erred by failing to award attendant care services; Gee asked the WCAC to remand the case to the magistrate so that Gee could present additional evidence regarding the value of his family's attendant care services, as this information had not been put in evidence at trial. The WCAC ruled that Gee was not entitled to an award of attendant care services, based on Gee's failure to prove the reasonable value of the services performed. Gee appealed, but leave to appeal was denied by the Court of Appeals and the Supreme Court. Gee then filed a new application for hearing, again requesting attendant care services. Arthur B. Myr Industries, Inc., Gee's former employer, moved to dismiss the claim as barred by res judicata, a legal doctrine which precludes parties from litigating claims that have already been finally decided in court. The magistrate denied this motion. Just before trial, the care providers filed applications for hearing seeking payment for attendant care services that they provided, but the case proceeded on Gee's application. After a hearing, the magistrate found that Gee was entitled to 56 hours per week of services. Myr Industries appealed to the WCAC, claiming in part that res judicata barred the award. The WCAC ruled that the magistrate correctly concluded that res judicata was not applicable and rejected Myr Industries' other claims. The Court of Appeals affirmed the WCAC's res judicata ruling in an unpublished per curiam opinion. Myr Industries appeals.

PAPPAS v BORTZ HEALTH CARE FACILITIES, INC. et al. (case no. 128864)
Attorney for plaintiff Patricia A. Pappas, Personal Representative of the Estate of Florinda C. Pappas, Deceased: Michael T. Reinholm/(248) 433-1414
Attorney for defendants Bortz Health Care Facilities, Inc., and Warren Geriatric Village, Inc., d/b/a Bortz Health Care of Warren: Paul R. Bernard/(248) 355-4141
Trial court: Macomb County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/128864/128864-Index.htm
At issue: This medical malpractice case involves the interplay among the wrongful death act, MCL 600.5852; the medical malpractice discovery rule, MCL 600.5838a(2); and the insanity saving provision of MCL 600.5851(1). Assuming that the six-month discovery provision in MCL 600.5838a(2) applies in this case because the plaintiff's decedent was insane from the time the claim accrued until her death, is the claim barred where the plaintiff did not bring this action within one year after the insanity disability was removed through death pursuant to MCL 600.5851(1)? Does the wrongful death saving statute, MCL 600.5852, apply in this case?
Background: Florinda Pappas suffered from senile dementia and other debilitating conditions and was a patient at the defendants' long-term care facility. Florinda fell several times between August 1996 and March 1997. As a result of a fall on March 26, 1997, Florinda underwent surgery the next day. She later returned to the facility, where she lived in an even more diminished capacity until her death four years later, on July 13, 2001. Her daughter Patricia Pappas was appointed personal representative of Florinda's estate on July 16, 2002. On June 2, 2003, Pappas sued the defendants for medical malpractice, claiming that they negligently failed to monitor Florinda and prevent her from falling and injuring herself repeatedly while in their care. The defendants moved for summary disposition, arguing that the lawsuit was barred by the statute of limitations. The defendants contended that the wrongful death savings provision, MCL 600.5852, was inapplicable because Florinda did not die before the two-year medical malpractice statute of limitations had run, and that MCL 600.5851, which tolls the statute of limitations in cases of insanity, did not save the action because under that statute, Pappas had only one year after Florinda's death to file suit. The trial court granted the defendants' motion for summary disposition, finding that the applicable statute of limitations expired on March 27, 1999. Pappas appealed. In an unpublished opinion, the Court of Appeals held that summary disposition was inappropriate because there was a factual question as to whether the "discovery rule" of MCL 600.5838a(2) had run at the time of Florinda's death; if objective facts demonstrated that Florinda could not have discovered the cause of action before her death, she would have died before the six-month period of limitation had run under this subsection, triggering the wrongful death savings act, the Court of Appeals stated. The appeals court reversed the grant of summary disposition to the defendants and remanded the case for trial. The defendants appeal.

BOODT v BORGESS MEDICAL CENTER, et al. (case no. 132688)
Attorney for plaintiff Melissa Boodt, as Personal Representative of the Estate of David Waltz, Deceased: Mark R. Granzotto/(248) 546-4649
Attorney for defendant Borgess Medical Center: William L. Henn/(616) 774-8000
Attorney for defendants Michael Andrew Lauer, M.D., and Heart Center for Excellence, P.C.: Curtis R. Hadley/(517) 351-6200
Attorney for amicus curiae Michigan Association for Justice: David R. Parker/(313) 875-8080
Attorney for amicus curiae Citizens for Better Care: Jules B. Olsman/(248) 591-2300

Trial court: Kalamazoo County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/132688/132688-Index.htm
At issue: MCL 600.2912b requires a medical malpractice plaintiff to mail a pre-suit notice to each potential defendant. Among other things, the notice must state (1) the factual basis for the lawsuit, (2) how the applicable standard of care was allegedly breached, (3) what the defendant should have done to comply with the standard of care, and (4) how the alleged breach of the standard of care proximately caused the plaintiff's injury. Does the plaintiff's notice of intent to the defendant physician comply with § 2912b's requirements?
Background: Melissa Boodt sued Dr. Michael Lauer for medical malpractice; Boodt alleged that Lauer negligently performed a balloon angioplasty on David Waltz, perforating Waltz's artery and causing his death from blood loss. Boodt also sued Borgess Medical Center, Heart Center for Excellence, P.C., and Lauer's professional corporation. The defendants moved for summary disposition, arguing that the plaintiff's notice of intent to file suit did not comply with the requirements of MCL 600.2912b and *Roberts v Mecosta Co General Hosp (After Remand)*, 470 Mich 679 (2004). In part, the defendants argued that the notice of intent did not distinguish among the defendants as to the standard of care that should apply to each, did not explain what the defendants should have done, and did not state how their actions caused Waltz's death. The trial court agreed and granted the motion, dismissing the complaint with prejudice as to all the defendants. The plaintiff appealed to the Court of Appeals, arguing that the notice of intent was sufficient to give the defendants notice of the nature of her claims, and that any dismissal should have been without prejudice in order to allow a successor personal representative to file a new notice of intent and complaint. In a published, split decision, the Court of Appeals affirmed in part, reversed in part, and remanded. All three judges on the panel agreed that the notice of intent, when read as a whole, was sufficient as to Lauer, but not as to the corporate defendants because it failed to mention them. The corporate defendants were dismissed with prejudice. Lauer and the Heart Center for Excellence, P.C., appeal; the plaintiff filed a cross-appeal.

MANZELLA v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al. (case no. 133620)
Attorney for plaintiffs Renie Manzella and Joseph Manzella: Robert J. Ehrenberg/(269) 983-0561
Attorney for defendant State Farm Mutual Automobile Insurance Company: Gregory G. Timmer/(616) 235-3500
Trial court: Van Buren County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/133620/133620-Index.htm
At issue: The plaintiffs sued their insurance company, claiming that it was obligated to pay them uninsured motorist benefits in connection with an automobile accident. The plaintiffs also sued the uninsured vehicle's owner and driver and got a default judgment against them. Is the insurance company contractually obligated to pay the default judgment?
Background: On October 4, 2003, a car operated by Israel Morado and owned by Fernando Miranda was traveling northbound on County Road 687 in Van Buren County when it crashed into the rear end of a vehicle operated by Betty Jane Reed, who was also traveling northbound on County Road 687. Within seconds after that collision, Renie Manzella, who was also driving northbound on County Road 687, collided with the rear end of Morado's vehicle; Manzella was seriously injured. Morado and Miranda did not have no-fault insurance. Therefore, Manzella and

her husband sought uninsured motorist benefits from their insurer, State Farm Mutual Automobile Insurance Company. State Farm denied the claim, so the Manzellas sued State Farm, as well as Morado and Miranda. State Farm filed two motions for summary disposition, arguing that the accident was Manzella's fault, and that it was not obligated to pay economic or noneconomic damages to the Manzellas. The trial court agreed and dismissed State Farm from the lawsuit. Morado and Miranda did not answer the complaint, so the trial court entered a default judgment against them in the amount of $174,000 for economic losses and $200,000 for noneconomic losses. The Manzellas appealed the trial court's dismissal of State Farm. The Court of Appeals reversed the trial court in an unpublished split decision, finding that State Farm is obligated to pay the default judgment entered against Morado and Miranda. The Court of Appeals majority focused on the provision in the insurance policy requiring State Farm to pay damages for bodily injury an insured "is legally entitled to collect from the owner or driver of an uninsured motor vehicle." The dissenting judge concluded that other policy provisions made it clear that, despite this policy language, State Farm is not contractually obligated to provide uninsured motorist coverage merely because a default judgment was entered against the owner and driver of the uninsured motor vehicle. State Farm appeals.

Afternoon Session

BURRIS v ALLSTATE INSURANCE COMPANY (case no. 132949)
Attorney for plaintiff Randy C. Burris: Craig J. Pollard/(734) 994-0200
Attorney for defendant Allstate Insurance Company: Christine M. Sutton/(586) 578-4500
Trial court: Wayne County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/132949/132949-Index.htm
At issue: A jury awarded the plaintiff attendant care expenses for services provided by his father, his brother, and his friend. The plaintiff was not billed for these services, and his caretakers could not provide records of the time they spent caring for him. The trial court vacated the attendant care award, finding that the plaintiff had failed to establish that he "incurred" the expense of these services within the meaning of the no-fault statute. The Court of Appeals reversed, reinstating the jury verdict. Did plaintiff "incur" attendant care expenses under MCL 500.3107(1)(a)?
Background: On July 17, 1978, six-year-old Randy Burris was riding on a bicycle with his mother when they were hit by a drunk driver. Burris sustained severe injuries, including orthopedic injuries, traumatic brain injury, and internal injuries. He was in a coma for several months and, while in the coma, suffered a stroke. As a result of his injuries, Burris's left arm and leg are nearly non-functional. Allstate Insurance Company is Burris's automobile insurer. Burris sued Allstate in 2002, claiming that Allstate had failed to pay medical expenses and attendant care benefits owing under the no-fault act. Under MCL 500.3107(1)(a), such benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." Burris claimed that his father, his brother, and a friend provided attendant care services pursuant to a doctor's order that he receive 24-hour care, and that Allstate had wrongfully refused to reimburse him for these reasonably incurred charges. Following a trial, a jury awarded Burris $86,048.98 in no-fault benefits, including an award of $78,438.00 for attendant care services. The trial court subsequently granted Allstate's motion for judgment notwithstanding the verdict in part, overturning the jury's award of attendant care benefits. The trial court concluded that any

services provided by Burris's father, brother, and friend were not reimbursable. He explained that the three "couldn't say what they did. They couldn't specify the number of hours. They couldn't even manage to say that they expected reimbursement. They went so far as to say they didn't expect to get anything." Burris appealed this ruling, and the Court of Appeals reversed in an unpublished opinion. The Court of Appeals ruled that the jury's verdict should be reinstated because Burris produced evidence, at trial, that attendant care services were actually provided to him. The Court of Appeals held that Burris "was not required to actually be billed by his family and friend in order to establish that he 'incurred' the expense of their attendant care services; thus, it was for the jury to decide whether he was entitled to collect the value of the services and to make the determination of the value." Allstate appeals.

PEOPLE v CARTER (case no. 134687)
Prosecuting attorney: Marilyn A. Eisenbraun/(313) 224-5794
Attorney for defendant Steven Michael Carter: Valerie R. Newman/(313) 256-9833
Trial court: Wayne County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/134687/134687-Index.htm
At issue: Because the defendant was indigent, the trial court appointed an attorney to represent him. The defendant's probation order stated that he was to repay the county $730 for his counsel's attorney fees. The Court of Appeals remanded this case to the trial court "to consider these assessments in light of defendant's current and future financial circumstances," citing *People v Dunbar*, 264 Mich App 240, 254-255 (2004). Did the Court of Appeals err? Are the constitutional underpinnings of *Dunbar* sound?
Background: Steven Carter was charged with fourth-degree criminal sexual conduct and habitual offender-second offense. Because Carter was indigent, the trial court appointed counsel to represent him. Carter was convicted by a jury and sentenced to two years probation, including 12 months of jail time. Although the judge made no mention of this fact at sentencing, Carter was also ordered to pay $730 in court-appointed attorney fees in the order of probation. In an unpublished decision, the Court of Appeals affirmed the conviction, but ordered resentencing and remanded for consideration of Carter's current and future ability to repay the fees per *People v Dunbar*, 264 Mich App 240, 254-255 (2004). The prosecutor appeals, arguing that the trial court was authorized by several statutes to enter the order of probation directing Carter to repay $730, and that none of those statutes required the trial court to consider Carter's ability to pay.

MINTER v CITY OF GRAND RAPIDS, et al. (case no. 133988)
Attorney for plaintiff Dorothy Minter: Mark McKay Grayell/(248) 350-3700
Attorney for defendants City of Grand Rapids and John Edward-Rheem Wetzel: Catherine M. Mish/(616) 456-4023
Trial court: Kent County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/01-08/133988/133988-Index.htm
At issue: Under Michigan's no-fault act, a person will only be responsible for noneconomic damages resulting from a motor vehicle accident "if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). Did the plaintiff, who suffered a closed head injury as a result of an automobile accident and was scarred, suffer a serious impairment of body function or permanent serious disfigurement?
Background: Dorothy Minter, who was 67 years old, was crossing a street in Grand Rapids on

foot when she was hit by a police car driven by Grand Rapids Police Officer John Wetzel. There is no dispute that the accident was Wetzel's fault. As a result of the accident, Minter sustained a closed head injury, as well as injuries to her right great toe and cervical spine. She also has a scar on her forehead above her right eye. Minter filed a third-party no-fault action against Wetzel and the city of Grand Rapids under MCL 500.3135, seeking to recover noneconomic damages. Minter alleged that she suffered serious impairment of body function and permanent serious disfigurement. A "serious impairment of body function" is "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). In *Kreiner v Fischer*, 471 Mich 109, 131 (2004), the Michigan Supreme Court stated that "Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected and he does not meet the 'serious impairment of body function' threshold." The defendants moved for summary disposition, arguing that the evidence did not establish that Minter suffered a serious impairment of body function or permanent serious disfigurement; as a result, Minter was not entitled to recover noneconomic damages, the defendants contended. The trial court granted the defendants' motion and dismissed Minter's lawsuit. In a divided published opinion, the Court of Appeals affirmed in part, reversed in part, and remanded the case to the trial court for further proceedings. The Court of Appeals agreed with the trial court that Minter did not sustain serious impairment of body function in relation to the toe and cervical spine injuries. The Court of Appeals majority held, however, that there is a question of fact whether Minter suffered a serious impairment of body function in relation to her closed head injury. Likewise, the Court of Appeals majority held that there is a question of fact whether Minter suffered permanent serious disfigurement in relation to the scar on her forehead. The dissenting judge concluded that the issue was one of law, for the trial court to decide, and that the trial court correctly applied *Kreiner* to the facts of this case. The defendants appeal.

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